22

NOV 10 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1945

No. 599

CLAUD COCHRAN,
Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

JAMES F. KEMP
JOHN M. JOHNSON
Attorneys for Petitioner

INDEX

	Page
Orders and judgments below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2, 3
Specification of errors to be urged	3
Reasons for granting the writ	3, 4
Cases:	
Salinger v. United States, 23 F. (2d) 48, 52 and citations	4
U. S. v. Dowait, 105 F. (2d) 218	4
U. S. v. Hodorowicz, 105 F. (2d) 218	4
Statutes:	
Sec. 2810, 2831 and 2803 of Title 18, U. S. C.	2

IN THE

Supreme Court of The United States

OCTOBER TERM, 1945

No._____

CLAUD COCHRAN,
Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

Claud Cochran prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause October 11, 1945, affirming the orders and judgments of the District Court of the United States for the Northern District of Georgia which overruled petitioner's motion for a directed verdict.

ORDERS AND JUDGMENTS BELOW

The order and judgment of the court overruling petitioner's motion for a directed verdict appears in the record at p. 35. The opinion of the Circuit Court of Appeals appears in the record at p. 47.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 11, 1945 (R. 48). The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Was the evidence sufficient to authorize the conviction of petitioner.

(2) Did the court err in affirming the judgment of the District Court.

STATUTES INVOLVED

The statutes involved are:

Sections 2810, 2831 and 2803 of Title 26, U. S. C.

STATEMENT

Petitioner was indicted at the October Term 1944 by a United States Grand Jury in and for the Atlanta Division of the Northern District of Georgia (R. 1). The indictment contained four counts. The first count charged petitioner with having in his possession an unregistered distillery; the second count charged him with making and fermenting two thousand gallons of mash; the third count charged him with working at an unregistered distillery and the fourth count charged him with the possession of ninety gallons of non-tax paid liquor. Petitioner went to trial on the 18th day of June 1945 and the jury returned a verdict of guilty on counts 1, 3 and 4 and not guilty on count 2 (R. 4). On the 9th day of July, 1945, the court committed petitioner to the custody of

the Attorney General for a period of one year and one day and to pay a fine of $200.00 to stand committed (R. 38).

The pertinent facts, as disclosed by the evidence, are substantially as follows:

Petitioner testified that he was working at the distillery but that he did not possess it and did not possess the non-tax paid liquor discovered there by the officers. He contends that the only evidence of his possession of the distillery and of the possession of the liquor is purely circumstantial and that his positive testimony to the effect that he was only working for a man who had been there and who was in charge of the distillery was sufficient to overcome the circumstantial evidence. He testified that he did not own the distillery or the non-tax paid liquor and that he did not have dominion and control over same.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court of the United States did not err in refusing to direct a verdict for petitioner on the ground that the evidence was insufficient to warrant their conviction.

2. In not reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The question involved is whether the evidence was sufficient to warrant the conviction of petitioner.

"Possession" within Act 1934, Sec. 201 means the exer-

cise of such a power over a thing as attaches to lawful ownership, or such dominion and control as will give the possessor the power of disposal.

U. S. v. Hodorowicz, 105 F. (2d) 218;
U. S. v. Dowait, 105 F. (2d) 218

A well known principle of law as stated by the 8th Circuit Court of Appeals is:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused."
>
> *Salinger v. United States,*
>
> 23 F. (2d), 48, 52 and citations.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

JAMES F. KEMP

JOHN M. JOHNSON
Attorneys for Petitioner

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	9

CITATION

Case:	
Salinger v. *United States*, 23 F. 2d 48	8
Statutes:	
Internal Revenue Code:	
Section 2803 (a)	2
Section 2803 (g)	2
Section 2810 (a)	2
Section 2831 (a)	3

675924—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 599

CLAUD COCHRAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 25) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 11, 1945 (R. 26). The petition for a writ of certiorari was filed November 10, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction.

STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in pertinent part:

> (a) No person shall * * * possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * *
>
> (g) Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

Section 2810 (a) of the Internal Revenue Code (26 U. S. C. 2810 (a)) provides:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is * * *. Stills and dis-

tilling apparatus shall be registered immediately upon their being set up.

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

Section 2831 (a) of the Internal Revenue Code (26 U. S. C. 2831) provides:

Every person engaged in distilling or rectifying spirits, * * * shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, * * * the name or firm of the distiller, * * * with the words: "Registered distillery," * * *.

* * * And every person who works in any distillery * * * on which no sign is placed and kept, as hereinbefore provided; * * * shall be fined not less than $100 nor more than $1,000, or be imprisoned not less than one month nor more than six months.

STATEMENT

An indictment filed against petitioner in the District Court for the Northern District of Georgia charged him in the first count with possess-

ing, and aiding another to possess, an unregistered still (26 U. S. C. 2810); in the second, with making, and aiding another to make, 2,000 gallons of mash on premises other than a duly authorized distillery (26 U. S. C. 2834); in the third, with working in, and aiding another to work in, a distillery on which no proper sign had been placed (26 U. S. C. 2831); and in the fourth, with possessing, and aiding another to possess, 90 gallons of distilled spirits in containers to which no internal revenue stamps had been affixed (26 U. S. C. 2803) (R. 1–2). The trial court directed a verdict of not guilty on count two, and petitioner was convicted on the first, third, and fourth counts (R. 20). He was sentenced generally to imprisonment for one year and a day and fined $200 (R. 20, 21–22). The Circuit Court of Appeals for the Fifth Circuit affirmed the conviction (R. 26).

The evidence for the Government may be summarized as follows:

Petitioner was apprehended by revenue agents at a distillery which was in actual operation (R. 4, 9). Before the arrest the agents had watched him for fifteen or twenty minutes (R. 5, 9), during which time he carried whiskey from the condenser and poured it into barrels (R. 4), made some repairs on a trough (R. 9), removed the cap from the still and let the spent mash run out, meanwhile pouring water around the still to prevent scorching (R. 5, 9, 10), and, finally, re-

filled the still with fresh mash from the heater box (R. 9–10). The only other person present was petitioner's son, who was observed gathering wood and bringing it to the furnace; he also threw water around the furnace while the spent mash was running out and then got some new mash to refill the heater box (R. 4–5, 9–10).

The still was located in a "sharp hollow" beside a narrow "woods road" at a point about 400 yards from the main road. The "woods road" was so narrow in the vicinity of the still that a car coming off the main road could not be turned around until it had been driven past the still to an open space about 200 yards up the hollow. (R. 4, 6, 8, 10, 11.) From the main road up to this open space, the "woods road" showed evidence of considerable travel, but it was not used beyond that point (R. 6, 8, 10). Petitioner's truck was found parked in the open space, and a comparison of the marks in the road with the tires of the truck showed that it, or another vehicle with similar tires, had made repeated trips in and out (R. 4, 5–6, 8, 10). Some of these marks in the road had been made in wet weather, some in dry weather (R. 6, 10), and all had been made by petitioner's truck or by "another vehicle with the same kind of tire" (R. 8).

In the truck, the agents found some scattered barley malt, some scraps of oak and pine, and some green paint smears which had rubbed off

some article that had been hauled in the truck (R. 6, 11, 12).

In the distillery yard, the agents found a 100 pound sack of barley malt (R. 11), some barrels painted the same shade of green as the smears in the truck (R. 8, 11), and a pile of oak and pine slabs which were being used in the distillery furnace (R. 5, 6, 11).[1] These slabs had not been on the premises the day before (R. 11, 12); they were cut so that they would exactly fit inside the truck (R. 6); and the whole pile could have been put into the truck (R. 11). There were 90 gallons of whiskey in containers to which no tax stamps had been affixed (R. 7, 10). There was no sign to indicate that the distillery had been registered (R. 7, 11). From "the age of the wood cut there, and the amount of travel, and the amount of wear on the work-way, the wear around the distillery yard, the age of the stumps where the wood had been cut," one of the agents concluded that the still had been in operation "for some little time" (R. 7).

Petitioner's home was about five miles away; there were other houses closer to the still (R. 12). Petitioner admitted to the agents that he owned the truck (R. 6, 13). He also admitted that he owned 400 acres of land and that his property line was "down the hollow a short dis-

[1] Besides these slabs of oak and pine, the operators of the still were also burning wood which they cut near the still (R. 5, 7, 10, 11-12).

tance below the distillery" (R. 7). It is not clear whether the still was actually on his property.

Petitioner, taking the stand in his own defense, denied that he owned the still, materials, or whiskey, and denied that he had brought in any materials or wood in his truck. His explanation was that a friend, who owned the still, had asked him to help run off the liquor because his helper had become sick after the mash was already made and fermented. Petitioner said that he had worked at the still only the day of the raid and the previous day. He refused to reveal the identity of the owner, and said that his son was not helping him but had just stopped by while out hunting. (R. 13–19.)

ARGUMENT

Petitioner apparently does not object to his conviction on the third count, which charged him with working in a distillery on which no proper sign was placed,[2] but he contends that the evidence is insufficient to support his conviction on the first and fourth counts for possessing the still and the liquor. The argument seems to be that the only evidence of possession, i. e., dominion and control, was purely circumstantial; that this was "overcome" by his own "positive testimony"

[2] The penalty for this offense is milder than those which may be imposed for the other two offenses of which petitioner was found guilty (see pp. 2–3, *supra*), and is less than the sentence which he was actually given.

that he was merely a hired worker; and, consequently, that the evidence was as consistent with innocence as with guilt, and a verdict should have been directed for him. (Pet. 3–4.)

The fallacy of the argument is plain. The holding in *Salinger* v. *United States,* 23 F. 2d 48, 52 (C. C. A. 8), upon which petitioner relies, is that "where *all* the evidence is as consistent with innocence as with guilt," a verdict should be directed. (Italics supplied.) But in this case, the evidence for the Government could only be explained on a theory of guilty possession. Petitioner was shown to have been operating the still with the assistance of his son; the still was located either on, or very close to, his property; and the evidence also strongly indicated that his truck had made numerous trips to and from the still in all kinds of weather and that he had brought in materials necessary for its operation. There was nothing to indicate that anyone else had anything to do with the still. Petitioner's explanation, besides its inherent weakness because of his failure to name the alleged owner, was contrary to the Government's evidence at several points, and the jury chose not to believe it. In these circumstances, it can scarcely be said that the court below erred in holding that the evidence justified the verdict, for as we have shown, the proof was substantial that petitioner did have the still and liquor under his

dominion and control. It is, of course, not true to say that circumstantial evidence of guilt can be "overcome" by the mere giving of testimony to the contrary, regardless of its credibility.

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions or important question of law is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

DECEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945